

August 15, 2008

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 08-1293

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In Regard to the Matter of:

Bayside State Prison

Litigation

OPINION AND REPORT

OF THE

MARTIN CARLESE,

SPECIAL MASTER

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

* * * *

FRIDAY, AUGUST 15, 2008

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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Transcript of proceedings in the above

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matter taken by Theresa O. Mastroianni, Certified

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Court Reporter, license number 30X100085700, and

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Nolary Public of the State of New Jersey at the

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United States District Court House, One Garry Plaza,

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Camden, New Jersey, 08102, commencing at 10:15 AM.

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MASTROIANNI & FORMAROLI, INC.

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856-546-1100

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BY: MARK ROSELLI, ESQUIRE

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BY: KENNETH LOZIER, ESQUIRE

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1 JUDGE BISSELL: I now reopen the record
2 with regard to Martin Carlese, civil 08-1293.

3 This opinion/report is being issued
4 pursuant to the directives of the Order of Reference
5 to a Special Master and the Special Master's
6 Agreement and the guiding principles of law which
7 underlie this decision to be applied to the facts
8 upon which it is based as set forth in the jury
9 instructions in the Walker and Mejias jury charges to
10 the extent applicable to the allegations of Mr.
11 Carlese.

12 As finalized after review under Local
13 Civil Rule 52.1, this transcript will constitute the
14 written report required under paragraph seven of the
15 Order of Reference to a Special Master.

16 Mr. Carlese was housed in the tents.
17 While he's not certain of exactly when the event of
18 which he complains occurred, he did mention August
19 7th or 13th.

20 He complains that when they were in the
21 tents the SOGs came to his tent, banged the area with
22 night sticks and came into it. He indicated it was
23 quite dark in there, there was only a red light on
24 and that an officer came up to his bed. He was very
25 compliant, was lying on his bed with his head down,

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1 the officer came up to his bed and said, "Is he
2 alive?" referring to Mr. Carlese.

3 Plaintiff then testified, beginning at
4 page nine, line three:

5 "So he hit me on the leg with his night
6 stick and said are you alive and I said yes with my
7 face still in the pillow. Then he says get up and
8 sit on the edge of the bed. And as I did that I
9 looked at him, he didn't have his mask on. So he
10 said what are you doing, put your chin in your chest.
11 And he said, as a matter of fact, kneel on the floor.
12 So I knelt on the floor and he made me walk all the
13 way across the floor on my knees."

14 The distance isn't defined, but no
15 doubt in his testimony he was made to do this.

16 "And I was at, you know, facing the
17 other officers and the one behind kicked me in the
18 back and I fell face forward.

19 "Kicked you in the back with what?

20 "His foot.

21 "Can you describe the severity of that
22 kick?

23 "It was pretty hard and intense.

24 "As a result of being kicked, what
25 happened, did you fall?

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1 "Answer: I fell face forward. My face
2 hit the ground because my hands were behind my back
3 and I was still on my knees. He made me kneel across
4 the floor with just my shorts on on my knees.

5 "So as I fell forward", I'm skipping a
6 little in the middle, "so as I fell forward he told
7 me we're going to be back. He said stay like this
8 until we get back. If you move, you'll get more.

9 "So I stayed like that and they left
10 and another officer came in about ten minutes later.
11 That turned out to be Blackbeard. Blackbeard said
12 what are you doing there."

13 And although the testimony is
14 contradictory based upon deposition testimony and
15 cross-examination, it appears that Blackbeard might
16 have kicked him lightly with his foot basically to
17 get his attention and told him to get up and get back
18 in his bed.

19 He was the housing officer on duty on
20 this shift. The plaintiff does not lay any injury to
21 the impact from Blackbeard, but he does say that he
22 had back pain as a result of having been kicked to
23 the floor.

24 Of course I considered the likelihood
25 that for no other reason such as transport or

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1 otherwise a SOG unit would just show up in a tent
2 during the nighttime hours. And there is some basis
3 for doubt about that. But in examining the
4 contemporaneous documentation and also the testimony
5 of Mr. Carlese, he testified that he went to medical
6 to complain about what happened to him and received
7 some warnings from the nurse at that point, but
8 nevertheless, the contemporaneous medical records, as
9 best I can garner from these documents, do recount
10 the event. And this is unlike a number of other
11 cases we've had here where there have been no
12 contemporaneous documents.

13 Now, to be certain, the majority of Mr.
14 Carlese's complaints both at the time and thereafter
15 have to do with pains in his shoulders. D-310, it
16 says: "He fell to the floor this morning and his
17 left shoulder is in pain. Also, patient has a
18 tenderness and a mild sprain in the cervical spine."
19 That, of course, is up in the neck area. So his
20 primary complaints were about problems with his neck
21 and shoulders. But the reference to falling to the
22 floor is very consistent with, one, the event which
23 Mr. Carlese described, two, the fact that he went to
24 get something done about it and, three, the cautions
25 mentioned by the nurse that she and he are not going

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1 to risk having any contemporaneous document about
2 having been kicked in the back by housing officers or
3 SOG officers. But she did, in fact, note the fact of
4 the fall.

5 I find that this represents the type of
6 contemporaneous evidence, other than just a he said
7 he said type of thing, that lends some credibility to
8 plaintiff's description of this incident.

9 From time to time here there have been
10 activities of these officers either proven or
11 unproven. In some cases the absence of entries in
12 the logs is significant. In this case, I don't
13 believe any log entries were introduced either on one
14 side or the other, so I'm not going to have to get
15 into that. But while the reference in the medical
16 records is hardly overwhelming, it does support the
17 fact that this event occurred. And once again, if
18 the members of the SOG unit wanted to act out or
19 assert their authority, what better place than in the
20 tents. The people down there in the tents, many of
21 them were transitory and most of them are ready for
22 reassignment elsewhere. It's not as if these were
23 people who were permanently housed in the unit for
24 months or years thereafter. It's a different
25 situation. And I find under these circumstances that

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1 Mr. Carlese has sustained his claim of having been
2 assaulted by a SOG officer in the manner in which he
3 described, that this did definitely constitute the
4 use of excessive force with the intention to inflict
5 some measure of pain, one, with the kick in the back
6 and, two, that the man was going to fall forward with
7 his hands behind his back and thereby sustain a
8 measure of injury or at least pain as a result of
9 that by falling forward on his face.

10 I do note though, checking the
11 subsequent medical history at least that's provided
12 to me here, that the predominant complaints were with
13 regard to the neck and shoulders which do appear,
14 once again overall, to be unrelated as such to the
15 incident in question. Mr. Carlese did not indicate
16 that those shoulder injuries were the result of this
17 and although he fell forward and may have had some
18 impact on his shoulder, that's not essentially the
19 essence of his injuries. There is little evidence of
20 continuity of pain with regard to his back and I do
21 not find that that resulted in a severe ongoing
22 condition beyond a short period after the incident in
23 question.

24 To reiterate, I do find that there was,
25 indeed, excessive, unnecessary force imposed upon Mr.

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1 Carlese here within the contemplation of those legal
2 principles and the definition of excessive force.
3 However, I also find in light of the fact that this
4 was not a prolonged, repeated or particularly
5 aggravated event, that it did not rise to a level of
6 being so egregious as to support a claim for punitive
7 damages, at least as to the unidentified officer who
8 allegedly inflicted this injury.

9 Finally, although not every item of
10 evidence has been discussed in this opinion/report,
11 all evidence presented to the Special Master was
12 reviewed and considered.

13 I find that the injury inflicted here
14 is actionable. I find that the injury was acute
15 initially, but did not become either chronic or
16 permanent, as I said, beyond a relatively short
17 period of time after the incident in question.
18 Accordingly, I recommend in this report that the
19 district court enter an award of compensatory damages
20 in favor of Mr. Carlese in the amount of three
21 thousand dollars.

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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.

Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. XI0857

Date: August 26, 2008

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